IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

R.S.A.No.1341 of 1980
Date of decision : 15.11.2006

Hazara Singh and others .....Appellants

versus

Banta Singh and others .....Respondents

CORAM : HON'BLE MR. JUSTICE HEMANT GUPTA.

Present : Mr.M.L.Saggar, Advocate for the appellants

Mr.Sanjay Majithia, Advocate for the respondents.

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JUDGMENT

HEMANT GUPTA, J. (oral)

The plaintiffs are in second appeal aggrieved against the judgment and decree passed by the Courts below, arising out of a suit for possession by way of redemption of the land.

The plaintiffs alleged that one Banta Singh was the mortgagee of the suit land who transferred his right in favour of defendant Nos.2 to 5 and one Ganda Singh. Ganda Singh has now expired and defendant Nos.2 to 5 are his legal heirs. Defendant Nos.2 to 5 have transferred their rights in favour of defendant No.6. While giving the particulars of the mortgage, the date of mortgage is mentioned as 1940, name of the mortgagors as Mohan Singh son of Budh Singh, name of mortgagee as Banta Singh and mortgage money about Rs.400/-. The learned trial Court dismissed the suit of the plaintiffs on the ground that the pleadings and the evidence is at variance as the particulars of the mortgage given in the plaint were at variance with the evidence led.

In first appeal, the plaintiffs moved an application for amendment of the plaint as well as an application for permission to lead additional evidence, in terms of Order 41, Rule 27 of the Civil Procedure

Code, so as to produce certified copy of the registered mortgage deed dated 1.2.1922. In the application for amendment of the plaint, the plaintiffs have pleaded that the original mortgage deed is with the defendants and with difficulty, the plaintiffs have got the certified copy of the mortgage deed dated 1.2.1992. The period of redemption fixed in the mortgage deed was 25 years. It is pointed out that due to inadvertence or negligence, the correct date could not be mentioned in the plaint and that the valuable right to redeem the land would be defeated, if the amendment is not allowed. By virtue of the application for additional evidence, the plaintiffs want to produce the certified copy of the mortgage deed in evidence.

The learned First Appellate Court has declined the applications on the ground that if the amendment is allowed, it will change the nature of the suit. In the suit, the mortgage sought to be redeemed is one allegedly made in the year 1940, whereas, the mortgage which is now sought to be made the subject matter of the suit, is of the year 1922. It was initially pleaded that the mortgagor is Mohan Singh and now the mortgagor is alleged to be Mohan Singh and Sohan Singh. The amount of mortgage originally pleaded is Rs.400/-, which is now alleged to be Rs.2000/-. The period of redemption was originally pleased as 8 years which is now alleged to be 25 years. Thus, it was concluded that the plaintiffs want to make altogether a new case under the pretext of amendment of the plaint, therefore, the amendment is not permissible. The Court also found that the period of limitation of redemption has already expired, therefore, the right to redeem stands extinguished.

The appellants have challenged the said order of the learned First Appellate Court in the memorandum of second appeal. The appellants

moved another application before this Court seeking amendment in the plaint as well. A reply has been filed by the defendants controverting the plea of the plaintiffs to seek amendment in the plaint. The learned counsel for the respondents has also argued that the plaintiffs have not challenged the order declining the amendment, by way of filing a revision petition and, therefore, the said amendment cannot be permitted to be disputed in appeal.

I do not find any substance in the arguments raised by learned counsel for the respondents that the plaintiffs cannot be permitted to challenge the order declining the amendment, in the present appeal. Firstly, the order passed by the learned First Appellate Court on an application under Order 6 Rule 17 of the Civil Procedure Code was not passed separately, but was passed while deciding the main appeal itself. As such, the said order is part of the impugned judgment and decree and thus the only remedy to dispute the said order is the present appeal.

Apart from this, Order 43, Rule 1-A contemplates that where any order is made against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced. In view of the Order 43, Rule 1-A of the Civil Procedure, the plaintiffs have a right to challenge the order declining the amendment in the plaint, passed by the learned First Appellate Court, in the present second appeal.

The reasoning given by the learned First Appellate Court declining the amendment in the plaint, is not tenable in law. The question whether the limitation, in respect of mortgage made in the year 1922 has expired or not, has been decided by a non-speaking order. The period of

mortgage was 25 years and right to redeem prima-facie would arise after the expiry of time so fixed. The mortgage was executed in the year 1922, therefore, it cannot be prima-facie held that the suit filed on 30.12.1970 is beyond the period of limitation and right to redemption stands extinguished.

Still further, no doubt, the particulars of mortgage in respect of mortgagor, mortgage amount and period of mortgage, are incorrectly mentioned, but the fact remains that the plaintiffs are the mortgagors and the defendants are the mortgagees. The plaintiffs have produced certified copy of mortgage deed dated 1.2.1922. Prima-facie claim of the plaintiffs cannot be said to be frivolous which will not allow the plaintiffs even to plead the necessary correct facts so as to seek redemption. Such amendment, if allowed, alone would give opportunity to the parties so that all the questions arising between them can be appropriately decided. If the amendment is allowed, none of the rights of the defendants are prejudiced as the defendants are continuing in possession throughout on the basis of mortgage which was effected in the year 1922. After the amendment is allowed, the defendants can raise such plea as would be admissible in law, so as to defeat the rights of the plaintiffs. But the plaintiffs cannot be denied the right of fair trial on the basis of correct facts.

Another argument raised by learned counsel for the respondents is that Mohan Singh alone has filed the suit. Therefore, the plaintiffs cannot be permitted to seek the amendment so as to plead that Sohan Singh was also mortgagor. However, I do not find any merit in the said argument as well. By virtue of the amendment, plaintiffs have sought to describe Sohan Singh as one of the mortgagors. But, Mohan Singh as one of the co-mortgagor has a right to seek redemption of the entire land on payment of

the entire mortgage amount.

In view of the above discussion, I am of the opinion that the learned First Appellate Court has erred in law in not allowing the plaintiffs to amend the plaint so as to describe the correct particulars of the mortgage and to enable the parties to seek decision on all the issues arising between the parties.

Since the First Appellant Court has not recorded any finding on the merits and proceeded to dismiss the appeal only after declining the application for amendment of the plaint, I deem it appropriate to set aside the judgment and decree passed by the learned First Appellate Court and remand back the matter to the learned First Appellate Court for afresh decision in accordance with law.

Consequently, the judgment and decree passed by the learned First Appellate Court, declining the amendment, is set-aside. The plaintiffs-appellants are permitted to amend the plaint. The learned First Appellate Court shall permit the defendants to file written statement to the amended plaint and thereafter decide the appeal in accordance with law after permitting the parties to lead evidence, if any. The appeal stands disposed of accordingly.

Parties through their counsel are directed to appear before the learned District Judge, Amritsar on 15.12.2006.

15-11-2006 (HEMANT GUPTA)
*mohinder JUDGE